In the

United States Court of Appeals

For the Ninth Circuit

In the Matter of the Application for a Writ of Habeas Corpus of GEORGE V. BAXTER,
Petitioner,
v.
B. J. RHAY, As Superintendent of the Washington State Penitentiary at Walla Walla, Washington,
Respondent.

No. 16172

APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

This matter arises upon an appeal of the petitioner from the order of the United States District Court for the Eastern District of Washington, Southern Division, denying petitioner's application for the issuance of a writ of habeas corpus. The District Court assumed jurisdiction over the matter

in accordance with the provisions of Tit. 28, Sect. 2241, U.S.C.A., and this court acquires its jurisdiction over the appeal from the order denying issuance of a writ of habeas corpus under the provisions of Tit. 28, Sect. 2253, U.S.C.A.

STATEMENT OF PLEADINGS

The appellee accepts the statement of pleadings as set forth in the appellant's brief (Pages 1-4), with the following exceptions:

The opinions of the appellant concerning the actions of the Honorable Sam M. Driver, Judge of the District Court, found in Paragraphs I and IV, found on Page 3, of the appellant's brief. ~~Additionally, the appellant at page 2 of his brief makes reference to having filed a petition for writ of habeas corpus in the Washington State Supreme Court, Cause No. 34269.~~

STATEMENT OF THE CASE

The appellee does not accept the statement of the case as set forth by the appellant, and in controversion thereof adopts the Findings of Fact of the District Court (R.O.A. Pages 56 and 57), which, for the convenience of the court, we are setting out in full below:

FINDINGS OF FACT

I.

The petitioner was accosted by Seattle police officers in the early morning of October 14, 1954, in a district known as Holly Park in Seattle. Before the officers were able to question him, he took flight. The officers gave chase, and he was subsequently apprehended and placed under arrest. At that time, he remarked, 'Well, you've got me this time.' He was first taken to the Georgetown precinct station and then transferred to the main jail in Seattle proper. Approximately eight hours after he was arrested, he was questioned by another officer, along with a news reporter of the Seattle Times in attendance. He refused to give any written statement or even have a written statement prepared for him, but made other admissions against his interest, such as 'If you were in my position, you would have run, too.' The reason for dropping the sledgehammer at the scene of the crime was 'I didn't want that with me when I was running' and 'It was holding me back' or 'I didn't have a chance with the hammer.'

During this interrogation, the petitioner complained to the questioners that he had been beaten and abused by the arresting officers. Upon being offered the services of a doctor, however, he refused. One of the questioners asked the petitioner to take off his shirt, and both testified that they saw no visible evidence that would demonstrate that the petitioner had been the victim of the type of beating that he had complained of.

II.

The petitioner was then charged with the crime of second degree burglary. He pleaded not guilty, and a jury trial was held on or about February 10, 1955. During the proceedings, he was represented by counsel. He was found guilty as charged and subsequently was found to be an habitual criminal. On May 16, 1955, he was sentenced to life imprisonment, a term he is now serving. * * * "

APPELLEE'S ARGUMENT

I.

Appellant in his specification of error numbered I, assigns error to the District Court's summary dismissal of three of the five grounds alleged in appellant's application for a writ of habeas corpus. (R.O.A. 6, 31, 32.)

The District Court found in its order to show cause (R.O.A. 31, 32) that issues numbered I, III and V in the appellant's petition for a writ of habeas corpus (R.O.A. 6), did not state grounds for relief by way of habeas corpus. The court gave its reasons as follows (R.O.A. 31, 32):

The District Court held that the facts alleged as the basis for relief in three of the five grounds in the appellant's petition (R.O.A. 6), did not, if accepted as true, constitute grounds for the issuance of a writ of habeas corpus. The District Court's authority for the striking of the three allegations

for relief is found at U.S.C.A. Tit. 28, Sect. 2243, which provides in part:

> "A court * * * or judge entertaining an application, shall forthwith award the writ * * * unless it appears from the application that the applicant or person detained is not entitled thereto * * *"

It has been consistently held that this section grants to the trial court the power to summarily dismiss a writ of habeas corpus, or a part thereof, when it does not state facts sufficient to authorize the issuance of a writ of habeas corpus. *Fleish v. Swope*, 226 F. 2d. 310 (9th Cir. 1955); *Lynch v. Johnson*, 160 F. 2d 950 (9th Cir. 1947); *Walker v. Johnson*, 312 U.S. 275 (1941).

Therefore, the issue here presented is not the correctness of the court's act per se, but whether the district court was correct in its conclusion that the facts alleged in appellant's application did not constitute grounds for relief. Since the appellant has set forth each of these grounds as a separate specification of error, the appellee will argue the correctness of the dismissal in accordance with the appellant's specifications of error.

II.

Appellant in his second specification of error alleges, at page 11 of his brief, that the district court erred when it failed to void appellant's conviction upon the ground that appellant was illegally seized and searched, and that evidence gained as a

result of the illegal search was admitted into evidence at his trial.

Since this issue pertains to one of the grounds summarily denied by the District Court (R.O.A. 31, 32), the appellee will argue the correctness of the court's summary dismissal.

The United States Supreme Court has held that states may not permit the violation of the Fourth Amendment to the United States Constitution, by providing methods or measures which would affirmatively result in such a violation. *Wolf v. Colorado*, 338 U.S. 25 (1949). But that court has also consistently held that whether evidence gained through an illegal seizure and search may be admitted into evidence at the trial of the person so seized is a question for the state courts alone, and that the Fourth Amendment does not deny to the states the power to permit such illegally obtained evidence to be used upon the trial of the accused. *Wolf v. Colorado*, 338 U.S. 25 (1949).

A restricted exception has been engrafted upon this rule by some decisions of the court, based upon the due process clause of the Fourteenth Amendment to the United States Constitution, but this exception has been consistently limited to cases wherein the person of the accused was also physically violated or abused, or some act was perpetrated, which shocked the conscience of the court. See *Rochin v. California*, 342 U.S. 165 (1952), and the cases cited therein.

In *Irving v. California*, 347 U.S. 128 (1954), the United States Supreme Court held, where a person's home was illegally searched and a microphone illicitly placed therein, from which officials obtained admissions and confidences of the accused which were material to his conviction, that such an illegal search and subsequent use of the evidence did not constitute a violation of due process of law, or of the Fourth Amendment to the United States Constitution.

Accordingly, it is clear that even if the Superior Court was in error in permitting the use of evidence obtained through the illegal search and seizure of appellant, such does not constitute a violation of appellant's constitutional rights, and does not supply a basis for the issuance of a writ of habeas corpus.

Therefore, the District Court was correct when it summarily denied the issuance of a writ of habeas corpus upon this alleged ground.

III.

In appellant's specification of error numbered III, found at page 12 of his brief, appellant seemingly takes exception to the District Court's finding of fact and conclusions of law (R.O.A. 56, 57), that the statements made by the appellant at the scene of the crime and under later interrogation were not the result of coercion.

The appellant testified that the arresting officers beat, kicked and struck appellant with their

pistols. (R.O.A. 44.) Yet, when a disinterested witness observed the appellant body for signs of such beating, none could be found. When the District Court inquired of the appellant as to the likelihood of a gun butt leaving some telltale mark, the appellant answered, "Your honor, at the time I was taken into the station there by Mr. Moody and Mr. Lundall. There was a knot sitting on my head. I am the type that puffs in, some people puff out. I am the type that puffs in. You wouldn't be able to see it or observe it very well, but you certainly would be able to feel it." (R.O.A. 52.)

If there is such a phenomenon, as asserted by the appellant, why did he not ask the person to feel the bumps, and why did he not later consult with a doctor and have the injuries authenticated.

Later, when the District Court asked the appellant for something which might corroborate his testimony, the only offer the appellant would make was the conflicting testimony of the arresting officers on other points. (R.O.A. 53.)

It is apparent from the record that the appellant not only failed to prove that he was beaten, but that appellant also failed to indicate, to the court, any relevant evidence which he might have in regard to such alleged beating.

Accordingly, the District Court acted correctly when it refused to issue a writ of habeas corpus on this ground.

IV.

Appellant's fourth specification of error, found at page 20 of his brief, is predicated upon the ground that he was denied the opportunity to appeal his conviction.

In his application for a writ of habeas corpus, appellant said, "3. Petitioner was unable to perfect an appeal due to his ignorance of legal procedure in a state which constitutionally guarantees appellate review in *all* cases." (R.O.A. 6.) The District Court summarily dismissed this claim, stating that, "There is no allegation that there was any affirmative action on the part of the State of Washington by its representatives which prevented petitioner from perfecting his appeal." (R.O.A. 32.)

Appellant by this assignment of error, wishes to bring his case within the rule announced in *Griffin v. Illinois*, 351 U.S. 12 (1956). The facts of the Griffin case and the instant case are easily distinguishable. Here appellant did not at any time move for the preparation of the statement of facts at county expense, in accordance with RCW 2.32.240, which provides in part:

> " * * * when the defendant in any criminal case shall present to the judge presiding satisfactory proof by affidavit or otherwise that he is unable to pay for such transcript, the judge presiding, if in his opinion justice will thereby be promoted, may order said transcript to be made by the official reporter, which transcript

> fee therefor shall be paid out of the county treasury as other expenses of the court are paid."

Before the appellant should be permitted to allege a violation of his constitutional rights, because of a denial of the preparation of a statement of facts, he should first be required to have requested such preparation under the statute quoted above. If appellant did not take advantage of the existing law for the free preparation, how can he show he was injured. It should also be noted here, that there was no allegation the statement of facts was needed to perfect an appeal, or that the statement of facts would be needed to show the alleged error in the trial court.

From the foregoing, it is clear that the District Court was not in error when it summarily dismissed this issue from consideration, as the appellant had failed to allege facts which would give rise to any right to a writ of habeas corpus.

However, such dismissal may be affirmed upon another ground as well. Prior to the time the District Court had summarily dismissed this issue, the appellee had, in his return and answer, asserted that such a denial of the right to appeal had never been presented to a Washington court. (R.O.A. 18.) In answer to this assertion by the appellee, the appellant in his Reply to Respondent's Return and Answer, quoted part of his "Supplement to Reply to Respondent's Return and Answer" filed in the Washington

State Supreme Court on appellant's previous application for a writ of habeas corpus (R.O.A. 28). The quotation set out does not show or even assert that the appellant had raised the question of denial of appeal in a previous application to a Washington court, but only indicated that at one time, the appellant had given notice of appeal. The mere fact that appellant gave notice of appeal does not relieve him of raising the question of a denial of such appeal before a Washington Court.

28 U.S.C.A., Sect. 2254, provides in part:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to a Judgment of a State Court should not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, * * *"

Here the appellee alleged that the appellant had not raised such an issue before a Washington Court. Appellant failed to deny such claim or to show otherwise, so such allegation must be taken as true. Accordingly, the issue may not be raised for the first time in a federal court. *Morgan v. Harrall*, 175 F. 2d 404 (9th Cir. 1949), certiorari denied 338 U.S. 827; *Barton v. Smith*, 162 F. 2d 330 (9th Cir. 1947).

Therefore, whether the District Court properly reasoned its summary dismissal of such issue is not determinative on appeal, as the appellate court may sustain the ruling of the District Court on the foregoing basis, even though the District Court ruling may have been based upon an erroneous reason.

L. McBrine Co. v. Silverman, 121 F. 2d 181 (9th Cir. 1941); *Petersen v. Coast Cigarette Vendors*, 131 F. 2d 389 (9th Cir. 1941); *Butterfield v. Wilkinson*, 215 F. 2d 320 (9th Cir. 1954).

V.

In appellant's specification of error numbered V, appellant alleges, at page 22 of his brief, that the state knowingly used perjured testimony in his trial.

As a basis for this contention, appellant cites, at page 22 of his brief, a partial statement of facts of his trial, prepared and filed in appellant's application for a writ of habeas corpus to the Supreme Court of the State of Washington, which is attached to appellant's brief.

In such statement, the arresting officers tell varied accounts as to the particular time they searched the appellant. However, as pointed out by the District Court (R.O.A. 38), if two descriptions of the same act or situation do coincide precisely, that would seem to be the questionable story. Mere conflict of testimony does not by any standard indicate or prove that one of the narrators, or both, are perjuring themselves. Memory is, at best, a faulty power, and no one seems to have perfected it to a point where it never fails. By showing this conflict in the testimony, the appellant did not prove that the witnesses perjured themselves, and clearly did not show that the state had knowledge or evidence of any perjury.

When the District Court asked the appellant, "What evidence is there here that the prosecutor framed you and used false testimony?" (R.O.A. 39), the appellant replied, "No, I am not claiming the prosecutor framed me or any of the officers or anything else * * * I do not think that they are trying to put something over on me * * *"

By his own testimony the appellant denies that he thinks that the prosecutor or officers attempted to "frame" him. Nor could the appellant point out to the court any evidence of such perjury other than a mere conflict in the testimony. Yet, again he makes this unfounded claim.

While it is true that the knowing use of perjured evidence by the prosecution in a criminal case is a violation of due process, *Mooney v. Holahan*, 294 U.S. 103 (1935), first of all it must be shown that the testimony was perjured. Mere conflict in the testimony does not so indicate. *Edwards v. New York*, 351 U.S. 804 (1956).

Accordingly, appellee submits that the District Court was not in error when it dismissed appellant's application for a writ of habeas corpus on this ground.

VI.

The appellant in his assignment of error numbered VI, at page 28 of his brief, alleges that his rights of due process under the Constitution of the State of Washington and the United States have

been violated, and that his conviction is void because the lower court failed to dismiss the action on the basis that the information had not been filed within the time prescribed by RCW 10.37.020, and additionally, that the appellant was not tried within the statutory time provided by RCW 10.46.010.

RCW 10.37.020 provides as follows:

> "Whenever a person has been held to answer to any criminal charge, if an indictment be not found or information filed against him within thirty days, the court shall order the prosecution to be dismissed; unless good cause to the contrary be shown."

RCW 10.46.010 provides as follows:

> "If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his own application, be not brought to trial within sixty days after the indictment is found or the information filed, the court shall order it to be dismissed, unless good cause to the contrary is shown."

The Supreme Court of Washington has decided that in order for a defendant to avail himself of the provisions of RCW 10.37.020, he must file a motion to dismiss the charges for delay and such motion must be made before the filing of the information or the defendant's arraignment. *State v. Seright*, 48 W. 307, 93 P. 521; *State v. Lorenzy*, 59 W. 308, 109 P. 1064.

If a defendant who has been informed against is not brought on for trial within sixty days after the

information has been filed, it is incumbent upon the defendant to move to dismiss the information under the provisions of RCW 10.46.010, and upon his failure to do so prior to the matter coming on for trial, our Supreme Court has decided that the accused waives his right under RCW 10.46.010. *State v. Wingard*, 160 W. 132, 295 P. 116; *State v. Austin*, 121 W. 108, 207 P. 954; *State v. Lydon*, 40 W. 2d 88, 241 P. 2d 202; *State v. Thomas*, 1 W. 2d 298, 95 P. 2d 1036; *State v. Todd*, 145 W. 647, 261 P. 397. Also see *Shepherd v. U.S.*, 163 F. 2d 974.

The defendant does not allege that motions were made to dismiss the charges upon the prosecutor's failure to file the information within thirty days, as prescribed by RCW 10.37.020, nor does he allege the filing of a motion to dismiss after sixty days had elapsed from the filing of the information and prior to the trial of the charges filed against him. Under such circumstances, it is the position of the appellee that the appellant waives his rights under the statutes quoted above, and he cannot at this time well complain that his rights of due process have been violated.

Further, it appears from the appellant's statement of pleadings that he was arrested October 15, 1954, information was filed November 29, 1954, and that the matter came on for trial February 10, 1955. So far as the record shows, the trial came on as soon as the orderly conduct of the court would permit, and the time lapse is not so great as would

constitute a violation of the appellant's rights of due process, or right to a speedy trial under the Sixth Amendment of the United States Constitution.

Accordingly, the appellee, having fully answered the assignments of error of the appellant, respectfully submits that the order of the late Honorable Sam. M. Driver, Judge of the United States District Court for the Eastern District of Washington, Southern Division, denying the appellant's application for a writ of habeas corpus, should be affirmed.

Respectfully submitted,

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